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SHOULD THE FEDERAL INHERITANCE TAX BE DEDUCTED BEFORE COMPUTING THE STATE TAX ON INHERITANCES?

The lawyers of New York and Massachusetts are debating the question whether in computing the state inheritance tax on a legacy it is proper first to allow a deduction of the federal tax on inheritances. In Massachusetts the practice is to allow such a deduction; in New York it has been held by the Court of Appeals that "our tax is to such a fraction of the gross estate as is arrived at by making calculations in which the federal tax is not declared."

A writer in the Massachusetts Law Quarterly calls attention to the injustice that results from this lack of uniformity in the computation of the inheritance tax where in one case the federal tax is deducted and in another, it is not. He wishes to know whether a federal question is presented by such a situation. He says:

"Suppose the act of congress had said in so many words the federal estate tax hereby imposed is intended as an excise, or cutting out, from the entire estate of an amount which *shall* be deducted before any similar taxes are imposed by the state. Could congress say this effectively under the Federal Constitution as part of the supreme law of the land binding upon the State of New York? Has it said so? The question whether it has said so seems to be a federal question as to the proper interpretation of the federal statute imposing the estate tax. If it has said so, the question whether it can say so legally seems to be a federal question under the Constitution of the United States. On this question of power, while it has been decided that "excises," etc., *must* be "uniform" only in a geographical sense, I do not understand that congress cannot so provide that they *shall* be uniform in some other sense. Has not Congress the power to protect from double taxation in this way even if not required to do so? Perhaps these are the real federal questions which may arise, the only other question being whether the New York court will continue to construe the state statute as ignoring the federal tax as a proper deduction, regardless of the unjust results which follow that decision, when the practice in other states, as in Massachusetts, for instance, allows the federal tax as a reasonable and a proper deduction."

In 90 Cent. L. J. p. 39 (issue of Jan. 16, 1920) we called attention to the opinion of Justice Hand in the case of Prentiss v. Eisner, 260 Fed. 589. In this case the peculiar character of the tax on inheritances is explained. The chief peculiarity of this form of taxation is that it is not against the legatee or the legacy but is a reservation to be held out of the estate before it is transferred to the legatee and such reservation is a condition to the vesting of the legacy. In other words a legatee does not inherit the amount of the legacy as fixed by the testator, and a distributee does not receive the amount fixed by the Statute of Descents and Distributions, but in either case the legacy or distributive share is the amount so fixed in the will or statute after first deducting the amount of the tax. In the case of a devise the devisee in effect gets only an equity, the inheritance tax being a prior lien on the property so devised and not a charge imposed upon the devisee. This is also the view taken by the New York Court of Appeals in Matter of Swift, 137 N. Y. 77, where that Court declares that by virtue of the inheritance tax, "the state reaches out and appropriates for its use a portion of the property at the moment of its owner's decease, allowing only the balance to pass in the way directed by the testator or permitted by its intestate law."

We do not see that a federal question is created by the construction of the New York courts in refusing to permit a deduction of the federal inheritance tax before computing the state tax. Both taxes

operate in the same way, on the same estate at the same time. Both demand the reservation of a fixed amount from a legacy or distributive share before it can properly become the property of the legatee or distributee. The right of inheritance and the right to take under a will are privileges created by law and can be made subject to whatever conditions the legislatures, both federal and state, having jurisdiction over the property of the decedent, may seek to impose. The jurisdiction of the federal government is co-ordinate with that of the state government and neither is restricted by the action of the other. The tax is computed in whatever way each jurisdiction may determine without regard to what the other may do.

We believe that this conclusion is sustained by the decision of the Supreme Court in United States vs. Perkins, 163 U. S. 625. In this case a testator domiciled in New York gave a legacy to the United States. New York sought to impose an inheritance tax on the legacy, which was resisted as a tax on the federal government. The Supreme Court denied the contention of the government on the ground that the tax was not imposed on the United States but on the New York testator's right to dispose of his estate. The Court declared that "the legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax."

It seems therefore clear that the state in assessing and computing an inheritance tax is in no way concerned with the fact that the federal government also exacts a similar tax upon the same rights and privileges. There is no rule of priority to be observed but each jurisdiction proceeds independent of the other. The fact that this results in double taxation is no objection to the legality of the tax, although it might be a proper basis for an appeal to the legislature or to Congress.

It is desirable, however, that in the matter of assessing inheritance taxes the states should adopt a uniform practice on the question of deducting the federal tax before assessing the state tax. The Conference of Commissioners on Uniform State Laws might very properly be asked to recommend a uniform law establishing the practice in this regard to be observed by all the states.

NOTES OF IMPORTANT DECISIONS.

IS AN ORDER OF A COURT OF BANKRUPTCY, DENYING A MOTION TO DISMISS A PETITION, REVIEWABLE BY AN APPEAL OR A PETITION TO REVISE?—Whether one who is aggrieved by the action of the District Court in a bankruptcy proceeding has a right of appeal to the Circuit Court of Appeals (Sec. 24a) or is limited to a petition to revise (Sec. 24b) is not infrequently a difficult question to decide. The right of appeal is given in respect to any decision of a controversy *arising in bankruptcy proceedings* of which the Court of Appeals would have had appellate jurisdiction if it had arisen in any other case in a federal Court. The right to revise is a summary jurisdiction given to the Court of Appeals to correct the errors of law of the District Court in bankruptcy proceedings, that is, the ordinary steps taken in such a proceeding to determine the fact of bankruptcy and administer the estate of the bankrupt.

The difficulty in determining the proper remedy in such cases is illustrated by the recent decision of the U. S. Court of Appeals (2nd Cir.) in the case of *In re* Dressler Producing Corporation, 262 Fed. Rep. 257. In this case appellant, Marie Dressler, owning one half of the stock of the alleged bankrupt corporation, instituted a proceeding in the New York Supreme Court to dissolve the corporation and to appoint a receiver. The directors subsequently filed in the federal Court an admission of bankruptcy, and asked to be declared a bankrupt. They further prayed that the proceedings in the state Court be stayed. The District Court, against the prayer in the intervening petition of appellant, assumed jurisdiction and stayed the proceedings in the state Court. The ground of appellant's intervening petition was that the

corporation was not insolvent and that the admission of bankruptcy was made for the fraudulent purpose of defeating the state Court's jurisdiction. The appellant sought a review of the trial Court's action and filed both an appeal and a petition to revise. On the question of the proper appellate procedure the Court of Appeals held that a defeated party in a bankruptcy proceeding could not take advantage of both remedies for review but must choose the proper one. In this case the Court held that the proper method of review was by petition to revise, which brought up only questions of law. On this interesting point, the Court said:

"We have considered the cause as coming to us pursuant to a petition to revise, rather than an appeal. Summary proceedings are reviewable only by a petition to revise. *In re* Goldstein, 216 Fed. 887, 133 C. C. A. 91; Gibbons v. Goldsmith, 222 Fed. 826, 138 C. C. A. 252. Where the Court of bankruptcy has erroneously retained jurisdiction to adjudicate the rights of an adverse claimant itself, the action may be reviewed by a petition to revise. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537; *In re* Gill, 190 Fed. 726, 111 C. C. A. 454; *In re* Vanoscope Co., 233 Fed. 54, 147 C. C. A. 123. There is a clear distinction between 'controversies arising in bankruptcy proceedings' and 'bankruptcy proceedings.' Bankruptcy proceedings, broadly speaking, cover questions between the alleged bankrupt and include the matters of administration generally, such as appointments of receivers and trustees, allowance of claims, and matters to be disposed of summarily. All of these matters occur in the settlement of the estate. *In re* Friend, 134 Fed. 778, 67 C. C. A. 500. The determining factor or the important considerations for ascertaining to which class the particular application belongs is to determine the object and character of the proceedings sought to be reviewed. If it is a controversy arising in bankruptcy proceedings, the Circuit Courts of Appeals exercise their jurisdiction as in other cases, under section 24a (Comp. St. § 9608). If the controversy pertains to proceedings in bankruptcy relative to the adjudication and the subsequent steps in bankruptcy, it is one which may be reviewed in matters of law upon notice and a petition by the aggrieved party."

In the earlier cases these two remedies for review of bankruptcy proceedings were regarded as cumulative and not exclusive. *In re* Lee, 182 Fed. 579; *In re* Flatland, 196 Fed. 310; *In re* Holmes, 142 Fed. 391. In the Lee case it was said that "an aggrieved party often has a choice of these methods." But the later authorities hold that the remedies are exclusive. Salsburg v. Blackford, 204 Fed. 438; Barnes v. Pampel, 192 Fed. 525; Bothwell v. Fitzgerald, 219 Fed. 408. In Moody v. Century Savings Bank, 239 U. S. 374, 36 Sup. Ct. 111, the distinction between the two remedies is carefully set forth. The Court said:

"Whether the Circuit Court of Appeals rightly sustained its jurisdiction turns upon whether this is one of those 'controversies arising in bankruptcy proceedings' over which the Circuit Courts of Appeals are invested, by section 24a of the Bankruptcy Act, with the same appellate jurisdiction that they possess in other cases under Judicial Code, § 128 (Comp. St. § 1120), or is a mere step in bankruptcy proceedings the appellate review of which is regulated by other provisions of the Bankruptcy Act? If it is a controversy arising in bankruptcy proceedings, the jurisdiction of that Court was properly invoked, as is also that of this Court. We entertain no doubt that it is such a controversy. It has every attribute of a suit in equity for the marshaling of assets, the sale of the incumbered property, and the application of the proceeds to the liens in the order and mode ultimatey fixed by the decree. True, it was begun by the trustees and not by an adverse claimant; but this is immaterial, for the mortgagees, who claimed adversely to the trustees, not only appeared in response to notice 'of the trustees' petition, but asserted their mortgage liens and sought to have them enforced against the proceeds of the property conformably to the contentions before stated. This was the equivalent of an affirmative intervention, and, when taken in connection with the trustees' petition, brought into the bankruptcy proceedings a controversy which was quite apart from the ordinary steps in such proceedings and well within the letter and spirit of section 24a."

A WIFE RECEIVING SEPARATE MAINTENANCE CAN RECOVER UNDER WORKMEN'S COMPENSATION ACT.—The Workmen's Compensation Acts usually provide that compensation in the event of workman's death, shall be paid to his dependents; and among those usually listed in the catagory of dependents is a wife "living with her husband or for whose support such husband was legally liable at the time of his death." It was recently contended that this language did not include a wife living apart from her husband with a decree for separate maintenance but the Supreme Court of California held that since the husband, by virtue of the decree of maintenance, is "legally liable" for his wife's support, the wife in such a case is entitled to the benefits of the Workmen's Compensation Act as a dependent. The Court said:

"There are cited in petitioner's behalf authorities to the effect that, when there has been a divorce *a mensa et thoro* with a decree of maintenance to the wife, the common-law obligation of the husband is supplanted by the obligation of the decree and the husband's responsibility is measured by the decree. This is true in the sense that the husband's obligation, previously indefinite as to the amount of sup-

port or the manner in which it should be provided, is by such a decree made certain by requiring that the obligation be met by paying a certain amount of money, and paying it to the wife. Thereafter the husband's obligation is measured by the decree, but the fundamental obligation continues. The decree is, in fact, a judicial determination of the fact that the obligation exists, although the parties are separated."

IS ONE WHO DREW UP A WILL ESTOPPED TO RECEIVE THE BENEFITS OF HIS OWN MISTAKE?—The question whether one can take advantage of his own mistake is discussed in the recent case of Reed v. Hollister, 186 Pac. Rep. 819. In this case it appeared that defendant, an attorney, drew up a will for his mother, by which she attempted to exercise a power of appointment with respect to a fund of $40,000 created by the will of her deceased husband. The trustee of the fund refused to recognize the bequests in the will as a proper exercise of the power and turned the entire fund over to the defendant, to whom it would have descended, under his father's will, in default of the exercise of the power of appointment by the widow. Under the will, which was an attempt to exercise the power of appointment, defendant would have received $8,000. The Supreme Court of California held that defendant was estopped to claim such fund and having received it from the trustee under his father's will he was to be regarded as a constructive trustee and required to pay the bequests made in the will which he himself drew up. On this point the Court said.

"The circumstances attending the execution of the will of Philoclea A. Hollister, and the fact that both she and the defendant, who prepared the will, understood that the third clause was an execution of the power of appointment, would be sufficient of itself to raise an implied or constructive trust against the defendant. Whether the defendant, as legal adviser of his mother, was mistaken in his understanding as to whether said third clause was an exercise of the power of appointment, is unimportant, for it would be in the highest degree inequitable, and not to be countenanced by a Court of equity, to permit an attorney at law, under whose direction and suggestion a will has been prepared, to himself seize and appropriate a part of the estate, which the testator intended, and which the attorney himself intended at the time the will was drawn, to go to another legatee or devisee. It seems that under such circumstances the attorney might well be held to be estopped to claim such bequest."

It seems to us that the Court's decision proceeds on the wrong theory. There is no estoppel in this case, because there was no misrepresentation of a fact by the defendant. Moreover, the defendant is not asserting a right from which assertion he can be estopped by reason of some former misrepresentation of a fact. If defendant, on the other hand, is to be held liable as a constructive trustee, he must be found to have intentionally misled the testatrix in executing the power of her will, and such action would then constitute such fraud in the acquisition of the fund as to create a constructive trust in favor of those defrauded of their interest under the will of the testatrix. A mere mistake in the matter of advising the testator in making her will cannot make the defendant responsible as a constructive trustee. Moreover, in this case the trust fund belonged to an entirely different estate and was under the control of the Courts of another state. Defendant was awarded the fund by those properly in control of the fund, and, it seems to us, that the proceedings in this case should have been brought against the trustee of the fund who had the right to determine, in accordance with the law of the state, where the power was created, whether the power had been properly exercised and who was entitled to the fund in default of the proper execution of the power.

THE RECORD OF THE "RAINBOW DIVISION" IN THE WAR AS TOLD BY A LAWYER.

It is very easy to start talking about the war, but it is much harder to stop talking about it. The fact is that anyone who saw our men fight over there is so filled with admiration for what the American soldier did that he seizes with eagerness on every chance to tell the people at home about their acts. As Congressman McKinley said, it was American organization, American brains, that let the men fight at the front. You can go farther than that and say it was America's immense resources in material and men and money that won the war. We did win the war. What fighting we did, compared to the three and a half years of the Allies' fighting was very small, but it

*[This interesting address by Col. Noble B. Judah of the Chicago bar before the Illinois Bar Association is really classic in its descriptions, and we find it a pleasure to comply with the suggestion that we give our readers the opportunity to enjoy it.—Editor.]

was the final punch. And without any bragging, it is fair for the Americans to say that the American armies did finally win the war.

I do not know any better way to tell you about what those men did than to tell you the story of one division, the 42nd, the Rainbow Division, not because it was typical of all American divisions—we thought it was the best one there—but because it was one of the divisions that entered the war early and saw all its phases. The great number of American divisions that got in in the summer and fall of 1918 saw only the one phase of the war when it had developed into open warfare, whereas the First, Second and Twenty-sixth and Forty-second, the early divisions, saw old-fashioned trench warfare. They then helped to break the Germans in semi-open warfare and then fought them to a finish in open warfare, and the Rainbow Division was one of those divisions. We speak of a division because it is the smallest self-supporting unit of the army. Roughly, it numbers 25,000 men, four infantry regiments, three artillery regiments, one engineer regiment, three machine-gun battalions, ambulance companies, field hospitals, supply trains, and so on, a unit that can fight, has all the auxiliary weapons, can feed its own men, supply food and ammunition and take care of its wounded and sick. It moves and acts by itself.

The Rainbow Division was made up of old National Guard units, the much despised militia. It was organized on paper in Washington in August and was gathered together on Long Island ready to sail for France in September, 1917. I do not know why they called it the Rainbow, except that we had units from so many states. We had organizations from twenty-six different states. Our infantry was the old 69th New York, an Irish regiment, from the days of the Civil War, the 4th Ohio, 3rd Iowa and the 1st Alabama; the artillery was the 1st Minnesota, 1st Indiana and 1st Illinois, later the 149th Field Artillery. In that regiment we had four batteries from Chicago, one from Champaign, the University of Illinois, and one from Danville. The machine-gun battalions were from Pennsylvania, New Jersey and Wisconsin; Engineers from South Carolina and California; ammunition train from Kansas; supply train from Texas; field signal battalion from Missouri; trench mortar battery from Delaware, and so on, from twenty-six different states. We were gathered at Camp Mills, and on the 18th of October sailed for France and landed there on the first of November, 1917. At that date there were less than 50,000 American fighting men in France, the whole of the 1st Division, a regular army division, part of the 2nd regulars and part of the 26th Division, National Guard from New England—less than 50,000 fighting men on November 1, 1917. A year later, at the date of the armistice, there were more than two million fighting men there and over 750,000 fighting in one battle. You can look at all the failures of our government, the ordnance, the aviation, the extravagances, but look at the other side of it and the mistakes look small. If we had done no more than transport those two million men, it would have been an achievement. But we drafted them, trained them, transported them, and when they reached France they were fighting men.

When Gen. Joffre was here in the spring of 1917 he asked the United States to send men. They knew we had no trained soldiers in the European sense, but they wanted to show that American soldiers could be transported to France; they wanted to boost the allies' morale. They said the training could be continued over there. And so, when we landed in France they first sent us to training camps. The artillery went to an old Napoleonic camp in Britanny, and the infantry went up closer to the lines near Toul. For three months we were trained for trench warfare under French officers, and finally, in February, we were ordered into a sector of our own. We were sent into the trenches at the edge of the Vosges

Mountains, in Lorraine, a quiet sector as it was called. There were a great many places on the Western front where no big offensive was to be feared, but where constant fighting was going on and where new troops could be trained. And we went into a sector of that kind.

Now the trenches were just what the word means, ditches in most places full of water; when we went in they were very full; it was winter and snow was still on the ground. The trenches are six, seven or eight feet deep; in front of them a strip of wire, perhaps two or three beds of wire twenty or thirty feet wide, then No Man's Land, then on the other side the German wire and German trenches. We had a front of about eight miles. At some places we were fifty feet from the German trenches, at other places six or seven hundred yards; part of the land was open, part of it was woods; and we proceeded to have some fine experience. We were in for four months. The fighting was guerilla and patrol fighting, but it let our men get their hands in; they found the Germans weren't any better than they were. They met them hand to hand in the trenches and No Man's Land and they gained confidence in themselves.

When we went in the French had used the sector as a rest sector. Every night they pulled back their outposts. There were many French villages right in the trench systems, of course shot to pieces, destroyed. But every village in France has houses made of stone and is a natural fort and at night the French in this sector withdrew into the villages and stood on the defensive. The Americans didn't understand that. We wanted to fight, and the first week we were in the trenches our Alabama regiment ran into a German patrol in our own trenches. The Germans had come in expecting the French were still there and they struck the Alabama men. Ten Germans came into the trenches; we killed two and took two unwounded prisoners. That was first blood for us. Right next was our New York regiment, and there was rivalry all the time between New York and Alabama and New York wanted prisoners. So they got permission to send a patrol over into the German trenches. Right opposite the New York regiment's sector was a little old destroyed village of perhaps two dozen houses. We knew there was a small German outpost there; the village was right in the wire, and the plan of our patrol was to go in through the wire, get back of the town and come out through it. We could not send a big patrol across No Man's Land. There would be too much noise, but we could send a small patrol out. We sent out a lieutenant and seven men of this 69th Irish regiment. Lieut. Cassidy was in command, O'Leary was his sergeant and Kerrigan was his corporal. They went out with their hands and faces blacked so they could not be seen in the dark, and armed only with hand grenades and trench knives. The American trench knife was a handy weapon for close fighting with a three-cornered blade and on the hilt indentations like brass knuckles. They got across No Man's Land, which was there about four hundred yards wide; they went in, four on each side of the town, and they came down through it and then ran into the German outpost of about ten men, a sergeant in command; he was on watch and saw our men come in. Just as he saw them, Kerrigan and O'Leary jumped him. Kerrigan was an ex-New York policeman and O'Leary had been an insane asylum keeper. All they had was their trench knives but there wasn't much left of the German sergeant and they brought the rest of his outfit back across No Man's Land.

The Germans were strong and of course they came back at us. And we had, in four months in that sector more than two thousand casualties, but we never lost an unwounded prisoner and no German ever got inside our lines. The thing that astonished the French was the fact that these new, green men and officers could fight, and fight well and coolly. The first small raid made by the Germans on our Iowa regiment was a very severe one at one point in the line. They isolated one of our strong points with

a heavy box barrage. In this outpost we had eight men under the command of a sergeant. Fourteen Germans surrounded the post and tried to gobble it up. We had two killed and several severely wounded. Of the fourteen Germans that came over, eight were killed, four were prisoners and two got back alive. At dawn, in the trenches we saw those men that had just come through fighting, fine, big, husky Iowa boys; their breakfast had just come up, and here were two of them sitting on the firing steps; four feet away from them was one dead German with his head blown off and one German so badly wounded he could not be moved; the rats were already at the dead one, and these two big husky farmer boys were sitting, eating their breakfast and talking about the fight as unconcernedly as could be.

We had daily fighting of that kind for nearly three months. But we wanted to get into big fighting farther north. When General Pershing made his famous offer to Marshal Foch after the German offensive of March 21, to take all the American forces there were in France, just four American Divisions that were fit to fight, the 1st, 2nd, 26th, and the 42nd. They were the only ones that had ever been in the trenches.

In March the Germans jumped off in their first great offensive of 1918 and pushed the British back, and again in April they pushed the French back. In the middle of May they pushed the French and the British back, and in those offensives the 1st Division got into the fight at Cantigny on April 28 and the 2nd Division at Belleau Woods in June. Finally, on June 21, the orders came for us to leave the trenches and entrain and they said we were going to Soissons where the big fighting was going on. But they unloaded us near Chalons, just south of Rheims.

The French command at that time knew that the fourth big German offensive was just about to break. The first three had been completely successful, and the Germans were advertising in Germany this fourth offensive as the Peace Offensive; it was going to end the war. The line on the Rheims front ran straight east and west from the Argonne Forest to Rheims and to the south around Rheims down to the Marne at Chateau Thierry, where the Germans had been held. About the first of July the French got word from their agents that the big push was coming between Rheims and the Argonne. And on July 5 they sent us into line on that front, the only American division. The signs of attack became more imminent every day. The aeroplanes picked up all the signs; troops moving up from the rear at night; their field hospitals being moved up, one of the sure signs of an offensive; the airdromes coming up; and finally, as the day of the attack drew nearer they even bridged the trenches opposite us to get their cannon across.

We went in on the 5th of July. The night of the 7th we stood to arms all night, but nothing happened. That Champagne country has a chalky soil; if you dig into the ground the air soon hardens the soil and then you have practically stone-walled trenches. The trenches were beautifully organized; they had concrete machine-gun posts, concrete observatories and were entirely dry. The German position was on a long line of crests from Rheims to the Argonne. The French were down in the valley with their first line trenches and the second line trenches were back about 800 yards on another low crest. General Gouraud, who commanded the Fourth French army, anticipated that the attack would be a severe one and a very critical one for the allied armies, and he worked out a new system of defense. Instead of leaving all his men in the front line trenches to be smashed to pieces by the artillery, he planned to pull them out of the first line before the battle and mass them all on the second line. In the front line he left just a few infantry watchers to send up the rocket signals when the German infantry came over and in the

open space between the first line trenches and the second line he checker-boarded machine-gun nests. They were to use enfilade fire on the German masses as they advanced.

The French made wonderful preparations; they brought in artillery and then more artillery. When the fight came on, on the ten-mile front where the attack was fiercest, there was a gun to fire for every ten yards of front. I do not mean that the guns were hub to hub; some of them were five hundred yards from the front and some of them four or five miles, depending on their caliber, but there was a gun on the ground ready to fire, one for every ten yards. And we knew the Germans had just as many or more.

On the 14th of July we thought surely it was coming. That was Sunday. The French had been getting prisoners every night and the prisoners had been talking. They said the attack was coming and it was going to be big and it was coming on this front. Sunday night, the 14th, the French got six prisoners. They said, "yes, the attack is coming tonight; the artillery preparation is going to begin at five minutes after twelve and the infantry attack at 4:30 in the morning." We got that information over the telephone about 10:45 p. m., with the order that the French counter artillery fire would begin twenty minutes before the German. Our own artillery came in on that. At a quarter to twelve the French fire came down on the whole front and then on our front the guns were going, one for every ten yards. It was just one glare, just one roar. You couldn't see a separate flash, you couldn't hear a separate discharge. The whole sky was red and the roar in the air ran up and down your spine in waves. For twenty minutes we waited. We didn't know whether the German attack was coming or not. If it did not come, the French had shown their hand and it might be very disastrous. But at five minutes past twelve, down came the German fire and then the roar and glare was doubled. For four hours that artillery fire lasted and then the rockets went up from our front line, the signal that the Germans were coming. Then our artillery fire was shortened and came down on our own front line trenches and the open space from the front back to our crest. The Germans had not expected that; they came across No Man's Land and got into our front line trenches without meeting resistance and came on through en masse across the open. Our guns were firing steadily on that space and the machine guns opened up on them and they simply melted away. And they kept coming on en masse and melting away. By seven o'clock that morning one of the battalions of our Ohio regiment had repulsed nine different attacks. The infantry came on to the attack until 11:00 in the morning. The Germans attacked with twenty-five divisions betwen Rheims and the Argonne and by noon those twenty-five divisions were broken and gone. The infantry fight was really over at 11:00 o'clock, but our guns fired from 10:45 the night before until 3:30 o'clock the next afternoon just as fast as the guns could be loaded and fired.

The attack came from the Argonne to Rheims and they didn't gain a foot. Not on that whole front did they get into the French position except at one place. We had a battalion of the Alabama regiment in reserve right back of that and they went in and cleaned the enemy out. The Germans also attacked west of Rheims as far south as Chateau Thierry, where they crossed the Marne. But the big push came from Rheims to the Argonne. That offensive was the Gettysburg of Germany. At midnight on July 14 it looked as though they would be successful; they had been successful in three offensives; they expected to be successful in the fourth; but they were over-confident and they lost and from then on their power waned. The French had not known what was going to happen. They thought the Germans might go through them and if the Germans had done so and had cut their lines and isolated the

left wing of the French army, another ending for the war would have been written.

By 6:00 o'clock on the night of the 15th we knew twenty-five German divisions were gone. The high command knew the big battle had been delivered on that front and that there was nothing to be feared on the British front. The French reserves were free. And two days later General Foch broke loose with his offense at Soissons.

We pulled out of line on Friday, the 21st, and began to entrain to go close down to Paris. They said they were going to give us two weeks' rest. We had lost more than two thousand men during the spring and had lost two thousand men in the Champagne battle. Our men had been fighting since the middle of February and it was then the 21st of July and we needed rest. We started to detrain our infantry thirty-five miles outside of Paris in the morning. At 4:00 o'clock the next afternoon we got telephone orders to load them into trucks and get them up north of Chateau Thierry and relieve the 26th Division. We had two regiments in then, the Iowa and the Alabama. By midnight they were moving in trucks up the road to Chateau Thierry. The roads were packed with troops going up and trucks and ambulances going down. We got our headquarters into Trugny about 4:00 o'clock in the morning. The Germans had been there the morning before. We were about four miles back of the battle line. Our infantry arrived at dawn and we got them up in the woods right back of the fighting that afternoon. The Germans were holding south of the Ourcq and the key to their position was a French farm, the Red Cross farm. Every farmhouse in France is a good fort, they are all built of stone with stone outbuildings; most of them dating back to the Middle Ages, and this Red Cross farm was particularly strong. It had a north and south road in front, a raised macadam road, with machine-guns all along back of the road and in the farm house and all along the edge of the woods. We did not have our artillery; it was horse-drawn; while the infantry had come in trucks. We were ordered to attack at dawn and we jumped off into thick woods just before dawn. The Alabama regiment went in three thousand strong and lost over a thousand men the first hour. I saw a company at noon that had gone in with two hundred and fifty men and had seventy-five men left. Iowa suffered equally. They fought all the morning and couldn't take the farm. About 4:00 o'clock in the afternoon they finally got into it, cleaned the machine-guns out and by sunset they had the Germans back to the edge of the woods. They fought all night through the woods and the next morning our other two infantry regiments came up in trucks, Ohio and New York. We fought all day and the Germans steadily went back towards the Ourcq, and at night they crossed the Ourcq and took up a position on the other side. The Ourcq River we would call a creek over here; it is only ten or twelve feet wide and a foot or two deep. On the other side there was a semi-circular crest and the two ends came down to the river. It was all open, no cover, no woods on either side. From the nearest woods on our side there was a slope of about six yards to the river, then say 600 yards up to the crest on the other side. At each point where the crest neared the river there was a French village of fifty or a hundred stone houses and they were very strong places. The Germans were in these villages and all along the crest with machine guns. We were ordered to force a passage of the Ourcq. The freshest regiment was the New York regiment. One battalion crossed at dawn in a thick mist. It started up the slope and every officer that went up the slope — and every officer in that battalion did—was killed or wounded. Out of one thousand men that went across there were less than three hundred left at noon. But we had a battalion for each regiment across by the afternoon of that day, and we had our own artillery. Then the fighting became fierce. We were under German artillery

fire and machine-gun fire. We could not go forward or back. The Iowa regiment was ordered in to take the village of Sergy on our right. When they got in they found we had a fresh division against us. We had fought the 6th Bavarian, the 10th German and the 201st German Divisions; when we got to Sergy we found that they had brought up one of their best divisions, the 4th Imperial Prussian Guard, and put it in position to hold us; and they did hold us there a while. We took Sergy and they took it back. In the next three days' fighting we took and retook it five times and the fifth time we held onto it.

On the left we had to take the town of Seringes. The Ohio regiment took it the second afternoon. The Germans drove us out and we retook it again three times and then held on to it. The New York regiment was fighting at the right of the Ohio regiment and the Alabama regiment was between New York and Iowa. The Alabama regiment couldn't go forward or back; they were completely exposed to fire from both flanks. The men would go forward and be raked by machine-gun fire and die. They couldn't move. They lost three majors and a lieutenant colonel wounded, and out of three thousand men that went into the battle they had about seven hundred men left when it was over.

By the end of the sixth day we were very weak. We had relieved the 26th American Division, a brigade of the 28th, and two French divisions and were spread out on a front of about three miles. The morning of the seventh day we went forward again and rolled on up over the crests of the Ourcq. There wasn't much left of us, but there wasn't anything left of the 4th Imperial Prussian Guard. We went on through the woods that day and that night we were relieved and came out and camped on the Ourcq battlefield. We had fought there for six days and had lost over six thousand men. It was hot and we had not had a chance to bury our dead and the German dead and we had to do it then. But a battlefield is inspiring; the fighting is inspiring and the battlefield after the fighting is over is inspiring. It is wonderful to see the dead and to see what they have done and what they accomplished. I never saw a dead American on the field of battle, except those who had been wounded and turned on their back to bandage themselves, who wasn't dead pointing head-on straight toward the enemy and with every muscle set to go forward. And on the battlefield there, where the New York regiment had gone up the hill the first morning we crossed the Ourcq every man lay in perfect attack formation all dead and all headed straight forward.

We stayed there a week about ten miles behind the battle front. Tired as we were they had to hold us in reserve. Finally, a week later, we were ordered out and marched back through Chateau Thierry and entrained near Paris. They took us back to Eastern France and said they were going to give us a month to rest up, and we needed it. It was then nearly the last of August and we had been fighting since February. We had lost more than ten thousand men out of our twenty-five thousand, and we needed replacements. The evening of the sixth day of our rest we received orders to pick up the division and start marching again.

We had information that we were going up towards St. Mihiel, that the American army was going to attack the St. Mihiel Salient. We couldn't march in the daytime on account of enemy aerial observation. We had to start the men at dark and get them into the woods out of sight before dawn. That sounds easy, but a division in column takes up about thirty miles of road space and there were about 300,000 other men moving in that same area.

The St. Mihiel operation was the first operation of the American army; before that we had fought as separate divisions, but in August they formed the army. They gathered all the American divisions over there together and gave us this big job to

do; and we used over 400,000 men in the St. Mihiel operation.

We received orders to march and we marched for nine nights. And the night we started to march it started to rain and it rained for nine nights and days. When we got up to the St. Mihiel country, the country was very wet. That is the Woevre country and it is very flat and muddy. The men were tired and wet and the trenches on our front were knee deep in water. We lay there in the woods and the night of the 11th of September we went into position. The artillery preparation opened up at midnight. The French had tried twice to wipe out the salient and they had had two bloody reverses. They were not sure the Americans could do it. They knew the men we had were fighters, but they did not think we had staff officers that could handle a big army.

We jumped off at 5:30 in the morning to the most successful operation the American army had. The Germans were trying to pull out of the salient in retreat and we turned the retreat into rout. On our front we took over 1,000 prisoners the first hour of the fight. We went in and reached our day's objective at 10:00 o'clock in the morning. We were to reach the Hindenburg line at 6:00 o'clock the next night. We had it before noon the next day. We captured men, artillery, ammunition, stores, clothing, food of all kinds. And that was the first taste our men had of loot, and from that time on they wanted to get into Germany and do a good job. The St. Mihiel advance was very successful, but it wasn't hard fighting such as we had had in the Champagne and on the Ourcq.

They kept us in that sector for two weeks to organize the new position. They then took us into the Argonne fight. That started on September 26, was the final offensive of the war, and continued until the armistice on November 11.

On September 26 the Americans jumped off on the whole front between the Meuse River and the Argonne Forest. They went through for six miles, then stopped on the German second position. There the fighting became very bitter. All during the month of October you heard about the terrific fighting up on the British front and the French front, how the Germans were pushed back from the ocean; how Ypres and Valenciennes had fallen. You did not hear very much about the Americans, except that they were having hard fighting, and we were. The country was tremendously rough, with a forest on our left and the river on our right. We had no large towns to attack, but it was a very important position for the Germans to hold. They were trying to pull their line back to Germany pivoting on that particular section from Verdun to the Argonne Forest. If the Americans were able to push them back on that front and cut the railroad at Sedan they would have no railroad communication back to Germany, and for that reason they threw in all they had to try and stop us.

The American army fought during the Argonne-Meuse offensive from September 26 until the armistice on about one-twentieth of the entire Western front, and during those forty days' fighting we met on that twentieth of the front more than one-fourth of the entire German army. The fighting was terrific. We relieved the First Division on October 12. They had lost 8,500 men the week before. The country was very wet, everywhere mud and it rained all the time. I have seen our tired horses fall down on roads so muddy that the driver would have to jump off and hold the head of his horse up out of the mud so he would not drown.

Finally, on the first of November, the Americans broke through all along the line. In four days we made more than twenty kilometers and hit the Meuse River on the 7th of November, our division holding the heights that overlooked the town of Sedan.

That last drive was terrific. Our men were terribly exhausted and the horses were more exhausted than the men. We had only horses enough left in the artillery regiment of our division to pull up in that last advance three batteries per regiment instead of six. We had then been in the fight continuously since February and it was now November; the men's vitality was gone. We went down between the 15th of October and the 1st of November from about 12,000 rifles in the division to a little over 5,000, about half casualties and the rest from exhaustion and sickness. When we reached Sedan we were very tired.

On the 10th of November we were relieved and pulled back from Sedan and on the 12th we started to march to Germany. The armistice did not make much difference except that the shell fire and the bombing stopped. The roads were still terrific. The first visible signs that war was over were seen at night when the motor trucks began to light up. Before that time we couldn't show a light at night because of the bombing planes.

On the 12th the march began and our division was finally billeted close to Coblenz. We had been in the line for 264 days. We had been under fire, actually fighting, for 184 days; we had been in reserve just behind the line and marching from front to front seventy days, and in all that time we had had six days' rest. That division was in line more days than any American division and made a further advance into enemy territory.

It was not American resources or wealth that won the war; it was the American doughboy with his bayonet that did it. It was just the men who went through the carnage of battle, battles like these and at the end still had their bayonet at the German breast that brought this war to a conclusion.

NOBLE B. JUDAH.

Chicago, Ill.

INSURANCE—FAILURE TO TAKE APPEAL.

McALEENAN v. MASSACHUSETTS BONDING & INS. CO.

Supreme Court, Appellate Division, First Department. February 6, 1920.

180 N. Y. S. 287.

Where a liability insurer, defending an action against insured, resulting in a judgment against him, assured him that an appeal would be taken, thereby leading him to take no appeal until the time for appealing had expired, it was estopped from asserting that an appeal would not have resulted in a reversal, or that he was not damaged in the full amount he was compelled to pay.

MERRELL, J. The plaintiff, Joseph A. McAleenan, was insured by the defendant, Massachusetts Bonding & Insurance Company, against liability for damages for injuries to third persons caused in the operation of said plaintiff's automobile. Under the contract of insurance the liability of the defendant company was limited to $5,000. The plaintiff met with an accident, as the result of which one Pietro Cimino lost his life as the result of an injury received from plaintiff's said automobile. An action was brought by the administratrix of Cimino to recover damages based upon the alleged negligence of the plaintiff herein. Under the terms of the policy of insurance issued by the defendant to the plaintiff, the defendant bonding company assumed the defense of the action. The defendant herein furnished its attorney, Holmes, and trial counsel, Heermance, to defend the Cimino action against the plaintiff. The trial resulted in a judgment in favor of the administratrix of Cimino against this plaintiff for $13,131.98. No appeal was taken from that judgment. The defendant bonding company paid the administratrix the limit of its liability, $5,000, besides interest and costs of the action. The plaintiff in this action was compelled to pay the balance of the recovery, amounting to $7,826.58. Thereupon the present action was brought by McAleenan against the bonding company to recover the moneys thus paid by him to satisfy the judgment rendered against him. The basis of the action was the alleged negligence and failure of the defendant to take and prosecute an appeal from the judgment recovered against this plaintiff in the Cimino action.

The defendant in the present action, upon the trial, offered in evidence the minutes of the trial in the personal injury action against this plaintiff, for the purpose of showing that no grounds existed upon which to obtain a reversal of the judgment in that action. Under

objection of counsel for the plaintiff herein the trial court refused to receive said minutes of trial in evidence, the court holding that the defendant, through its attorneys and agents, having refused to permit an appeal to be taken by the plaintiff herein from the judgment in the personal injury action, and in agreeing and assuming to prosecute an appeal from said judgment, took away from the plaintiff valuable rights which he had, and was estopped from denying that there were reversible errors upon the trial, and from asserting that the plaintiff herein suffered no damages by reason of the failure of the defendant to bring an appeal from said judgment. The defendant insists upon this appeal that as a part of plaintiff's case, showing that he suffered damages by reason of the failure to bring said appeal, it was incumbent upon him to introduce in evidence the record and minutes of the trial of the personal injury action, showing the commission of error on said trial, or that the verdict rendered was against the weight of the evidence, and that a reversal would have resulted from such appeal, had one been taken.

It seems to me that the court properly held that in view of the attitude of the representatives of the defendant bonding company, and of its assurance to the plaintiff herein that an appeal would be taken and that a reversal would result, thus lulling him into security and depriving him of his right to appeal, defendant is precluded from asserting that an appeal would have been without effect, and that a reversal would not have resulted, had such an appeal been taken. Aside from the question as to whether or not errors were committed upon the trial requiring a reversal, had an appeal been taken it might thereon have been determined whether or not the verdict rendered was against the weight of the evidence. The amount of the verdict also might have been tested, and a determination reached whether or not the recovery was, under the circumstances, excessive. Not only that, but the failure of the defendant to bring an appeal precluded any possible compromise of the recovery which might have been effected, had an appeal been taken. Furthermore, there was lost to the plaintiff herein the privilege of paying up the amount of the judgment recovered promptly and stopping the accumulation of interest thereon. All of these were valuable rights, which the plaintiff herein lost as the result of the failure of the defendant to keep and perform its representation and promise to bring an appeal from said judgment.

The case of Globe Navigation Co., Ltd., v. Maryland Casualty Co., 39 Wash. 299, 81 Pac. 826, seems to be exactly in point. In that case it was held that estoppel to deny liability on the part of the appellant to respond in damages arose from a similar act of the defendant. In the course of its opinion in that case, the Court said:

"It is insisted that estoppel does not arise unless it is shown that respondent has been actually prejudiced, and that it does not appear that the judgment of the Hawaiian court was wrong, and would have been reversed on appeal. That is a matter this court cannot determine. * * * The respondent, therefore, had the absolute right to have the cause reviewed on appeal. It was induced to abandon that right by the conduct of appellant, and the latter should not now be heard to say that respondent was not prejudiced because of mere absence of a positive demonstration that it would have secured a reversal on appeal. No one except the Infinite Mind can determine that question to a certainty at this time. Not even the court that would have reviewed the case can now know whether in its view reversible error would have appeared or not. But the certain fact does appear that, by reason of appellant's conduct, respondent did not have the benefit of the wisdom and experience of the learned judges of the appellate tribunal, the United States Circuit Court of Appeals. We therefore think appellant is now estopped to deny its liability to pay as it promised, which included both the amount of the judgment and the subsequently incurred costs."

It is of course impossible, in the case at bar, to say what would have been the result, had an appeal been taken; but by reason of the conduct of the defendant bonding company, plaintiff was deprived of opportunity of review, in the appellate court, and the defendant, whose act deprived plaintiff of his rights, is, it seems to me, estopped to deny its liability to reimburse plaintiff for the full amount which he was compelled to pay.

Affirmed.

NOTE—*Proof of Injury Which from Failure to Perform Is Incapable of Estimation.*—There is a maxim *omnia praesumuntur contra spoliatorem*, but it has been said, "There is great danger that the maxim may be carried too far." For example, where the maxim has reference to the contents of a paper destroyed or withheld if the contents are proved, there is no need for resort to the maxim. Bote v. Wood, 56 Miss. 16; Jones v. Knauss, 31 N. J. Eq. 609. But the destruction of a receipt may presume payment of money. Downing v. Plate, 90 Ill. 268. And where agreement is made to keep strict account of the working of a coal mine extending under adjoining land, this may raise the presumption that the entire mass, or no part of the same, according as it was the interest of his adversary to contend, was from under the adjoining land. Dean v. Thwaits, 21 Beav. 621.

And so where it was the duty of a member of a firm to keep its books, the other partner may claim he used more in his family expense

than he charged himself with. In other words, it shifted the burden to him. Dimond v. Henderson, 47 Wis. 172.

And if a second will is destroyed, it was said: "It is far better to declare an intestacy, than that a spoliator should be rewarded for his dishonesty." Of course, this ruling should be deemed as the limit as against the spoliator in a particular case. Jones v. Murphy, 8 Watts & S. (Pa.) 275.

But suppose one makes an engagement to do a certain thing and both know that failure of performance, in the very nature of the case, can leave behind it no competent evidence as to the injury that may thus arise, does this constitute a contract to do anything at all? It seems to me, that, if this were a casual contract and outside of the engagement, the contracting parties incurred no obligation, one to the other, it would have no binding force. But suppose this were a matter of default by, say an agent, would not the matter take on a different attitude? The case of Dimond v. Henderson, 47 Wis. 172, is illustrative of the distinction suggested, making the maxim above set up apply.

The insurance company occupied a position in which it was the agent of the assured and to its default the maxim applied. But as an independent contract it seems to me there would be a *nudum pactum*. The agent should not be allowed to deprive the principal of a positive right, by his neglect of duty, upon any supposition that this right was of no real value. It had a possibility of value. As this case was merely a defense, the legal possibility was of the assured being entitled to a verdict in his favor. It would not cover a case where there was a counterclaim.

C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1920—WHEN AND WHERE TO BE HELD.

American—Statler Hotel, St. Louis, Mo., August 25, 26 and 27.

Alabama—Birmingham, April 30 and May 1.

Arkansas—Hot Springs, June 2 and 3.

Georgia—Tybee Island, May 27, 28 and 29.

Illinois—Hotel Sherman, May 28 and 29.

Indiana—Indianapolis, July 7 and 8.

Iowa—Cedar Rapids, June 24 and 25.

Kentucky—Henderson, July 14 and 15.

Louisiana—New Orleans, May 7 and 8.

Maryland—Hotel Chelsea, Atlantic City, N. J., June 24, 25 and 26.

Michigan—Detroit, June 25 and 26.

Minnesota—St. Paul, July 27, 28 and 29.

Mississippi—Meridian, April 28 and 29.

New Jersey—Atlantic City, June 11 and 12.

North Carolina—Asheville, June 29, 30 and July 1.

Ohio—Cedar Point, July 6, 7 and 8.

Pennsylvania—Bedford Springs, June 22, 23 and 24.

South Carolina—Columbia, April 23 and 24.

Virginia—The Jefferson Hotel, Richmond, May 11, 12 and 13.

Wyoming—Casper, May 7 and 8.

HUMOR OF THE LAW.

A Probate Judge who talks in verse
Suggests a decorated hearse.

A Probate Judge who outlives you
May break your will—yes, tax it. too.

Concerning various other things
His power outrivals that of kings.
If he decides you are insane
All your remonstrances are vain.

Patient he sits, while year by year
Old women whisper in his ear;
All sorts of skeletons he knows,
Sad secrets told beneath the rose.

He construes the obscure devise,
And shows the difference which lies
'Twixt tweedledum and tweedledee,
Which is sometimes hard to see.
In times of stress his powers prevail;
He sends contemptuous folks to jail.
And by injunction's awful might
Protects the weak and guards the right.
Thus equity corrects the flaw
Which justice finds in common law.

ROBERT GRANT.

"So you've got an accident to report, have you?" said the head clerk to the foreman of the works.

"Yes, sir," said the foreman; then he paused a while, gnawing his pen reflectively, before handing over his report.

The latter read as follows:

"Date: March 31. Nature of accident: Toe badly crushed. How caused: Accidental blow from a fellow-workman's hammer. Remarks—"

"Right," said the clerk. "But why no 'Remarks'?"

"Well, sir,' replied the foreman, slowly, "seein' as 'ow you know what Bill is, and seein' as 'ow you know that it was 'is big toe what was hurt, I—well, I didn't like to put 'em down. —*London Tit-Bits.*

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Bailment**—Burden of Proof.—The gist of a cause of action as bailor against bailee is negligence, and the burden rests on the bailor to plead and prove negligence as the cause of the loss or injury; a burden resting on him to the end of the case.—McKeever v. Kramer, Mo., 218 S. W. 403.

2. **Banks and Banking**—General Deposit.—The making of a general deposit with a bank creates the relation of debtor and creditor between the bank and the party in whose name the deposit is made.—Meador v. Rudolph, Tex., 218 S. W. 520.

3.——Joint and Several Liability.—The directors of a bank may be severally or jointly, or severally and jointly, liable to stockholders for a loss resulting from negligence on their part, dependent on varying degrees of fidelity to the trust imposed, and on the character of negligence, whether by them as individuals or as a board.—Tackett v. Green, Ky., 218 S. W. 468.

4.——Ultra Vires.—An action may be maintained against a national bank for damages resulting from its malicious or negligent torts, and in such a case the doctrine of ultra vires has no application.—Security Nat. Bank v. Home Nat. Bank, Kan., 187 Pac. 697.

5. **Bills and Notes**—Equitable Owner.—Where plaintiff sold a saloon business to defendants and had the note for the price made payable to a liquor company, to which he expected to sell the note, he was the equitable owner, and could sue on the note in his own name.—Wahl v. Ramsey, 218, Tex., S. W. 559.

6.——Negotiation.—That note was given to payees merely for purpose of having it indorsed by them to aid in the further negotiation of the note to some other person did not, in absence of agreement that note should be discounted by payees and no other person, release accommodation maker from liability upon theory that it was never delivered to payees, and therefore never became a valid obligation against accommodation maker, where accommodation maker's credit was extended for the purpose of enabling the other makers to procure money.—Rabb v. Seidel, Tex., 218 S. W. 607.

7. **Boundaries**—Acquiescence.—Mere acquiescence in the existence of a fence between two lot owners and occupancy of land up to it does not necessarily amount to an agreement that it is on the accepted boundary line between the lots.—Hill v. Schumacher, Cal., 187 Pac. 437.

8.——Courses and Distances.—A call in a survey for corners on the ground is superior to calls for course and distance.—Brooks v. Slaughter, Tex., 218 S. W. 632.

9.——Monuments.—Monuments will control courses and distances in construing a deed.—Schiffmann v. Youmans, Ore., 187 Pac. 630.

10. **Breach of Marriage Promise**—Repetition of Promise.—When a man and woman once promised to marry each other, different and subsequent repetitions were mere ratifications and constituted no new contract.—Dyer v. Lalor, Vt., 109 Atl. 30.

11. **Carriers of Live Stock**—Proximate Cause.—Where an act of negligence on the part of a carrier of live stock concurs with an act of God in producing an injury, and the injury would not have happened without the negligent act, the carrier is responsible for the damages arising from its act.—Kansas City, M. & O. Ry. Co. of Texas v. Blackstone & Slaughter, Tex., 218 S. W. 552.

12. **Carriers of Passengers**—Collision.—The facts constituting the negligence resulting in collision being peculiarly within the knowledge of defendant railway company, plaintiff passenger was not bound to prove the particular acts of commission or omission upon the part of the employes of defendant which caused the accident, and was not therefore required to allege the same in his petition.—Arnett v. Illinois Cent. R. Co., Iowa, 176 N. W. 322.

13. **Charities**—Forfeiture.—Where an instrument donating a fund to a university, provided for a forfeiture and a return of the fund for noncompliance with the conditions and trusts thereof, a suit to enforce such provision and for an accounting was properly brought in equity, as equity will grant relief for breach of a condition subsequent, though it will not enforce a forfeiture.—Curtis & Barker v. Central University of Iowa, Iowa, 176 N. W. 330.

14. **Contracts**—Adequate Consideration.—Ordinarily Courts will not inquire into the adequacy of the consideration of a contract.—Mowbray Pearson Co. v. E. H. Stanton Co., Wash., 187 Pac. 370.

15.——Breach.—Where plaintiff's contract to do carting for defendant for a year had been partially performed, and payment made for some months, even if it was unilateral in its inception, defendant cannot urge such objection, when sued for its breach.—Manhattan Carting

Co. v. Keen's English Chop House, N. Y., 180 N. Y. State 409.

16.——Ejusdem Generis.—It is the ordinary rule in construction of contracts and written instruments that special terms will control general terms.—Southern Surety Co. v. Town of Greeneville, U. S. C. C. A., 261 Fed. 929.

17.——Embargo.—Contract for sale of steel plates for export was not illegal, because thereafter a government embargo on such shipments was promulgated, where it is not shown that either party intended to make shipment without government permit.—Commons v. Pearson, N. Y., 180 N. Y. State 482.

18.——Impossibility of Performance.—Generally one contracting to do a thing possible in itself will be liable for a breach, notwithstanding the occurrence of a contingency which, though not foreseen by him or within his control, might have been provided against, has put it out of his power to perform.—Western Drug Supply & Specialty Co. of Kansas City, Mo., v. Board of Administration of Kansas, Kan., 187 Pac. 701.

19.——Place of.—Arkansas Courts will, as Texas Courts would, in a like controversy, apply the laws of Texas in determining the validity of a contract made and to be performed in Texas.—Buchanan-Vaughan Auto Co. v. Woosley, Tex., 218 S. W. 554.

20. **Corporations**—Cumulative Voting.—Shareholders may cumulate and vote shares for one or more candidates for director.—State v. Du Brul, Ohio, 87.

21.——Foreign Corporation.—Service of summons on a foreign corporation in a state where it is not shown to be doing business or to have property, and in which it has not appointed an agent under the state law on whom service may be made, is ineffective.—Pine Hill Coal Co. v. Gusicki, U. S. C. C. A., 261 Fed. 974.

22.——Majority Stockholders.—Majority stockholders of an insolvent and failing company occupied a fiduciary relation to the minority stockholders, and were held to the highest good faith in the disposition of the corporate property; but the trust imposed upon them having been discharged, and it being shown that their actions were just and fair to the interests of all, minority stockholders will not be heard to invoke the well-grounded principles applied in cases involving fraud, imposition, or design to obtain corporate property by ulterior means.—Carrier v. Dixon, Tenn., 218 S. W. 395.

23.——Preference.—A creditor, who sold coal to an insolvent corporation, making delivery on the days on which bill for appointment of a receiver was filed, is not entitled to a preferred claim, unless the corporation was insolvent at the time of the purchase, and unless it concealed its insolvency and purchased the coal without intention of paying therefor.—Hyman v. Trow Directory Printing & Bookbinding Co., U. S. C. C. A., 261 Fed. 991.

24.——Promoter.—Promoters of a corporation stand in a fiduciary relation to the corporation and its stockholders, and owe the utmost good faith, so where the promoter of a mining corporation obtained title to mining claims, and without disclosing the facts induced the corporation to issue stock in return for the conveyance of such claims, the corporation and stockholders have an option to have the stock so issued annulled.—Frame v. Maloney, Ariz., 187 Pac. 584.

25.——Repurchase of Stock.—A corporation's agreement to repurchase stock sold an employe in case the employe quit or was discharged constituted only an option until the employe elected to sell.—Security Sav. Bank v. Workman, Iowa, 176 N. W. 307.

26.——Res Judicata.—Where deficiency judgment was rendered against corporation in action on notes secured by chattel mortgage, questions as to the due execution of the note, the consideration therefor, and as to other matters relating to the validity thereof were res adjudicata in judgment creditor's action against stockholder on stockholder's liability.—Barnard v. McIntire, Cal., 187 Pac. 440.

27. **Criminal Law**—Accomplice.—Corroboration of the testimony of an accomplice may be by proof of circumstances, as well as by direct testimony.—Bush v. People, Col., 187 Pac. 528.

28.——Confession.—That a confession was made while defendant was in custody, and in answer to questions propounded, is not sufficient ground for the rejection of the confession, as being involuntary.—State v. Hayes, Kan., 187 Pac. 675.

29.——Prosecuting Witness.—In a prosecution for assault with intent to commit rape, testimony as to declarations and complaint of the prosecuting witness, defendant's servant or housekeeper, made after she had removed to another person's house temporarily some time after the alleged offense, was inadmissible, and not part of the res gestae, as the declarations were not spontaneous.—State v. Johns, Iowa, 176 N. W. 280.

30.——Res Gestae.—A statement of deceased that he was glad that the officers got the right man, made when an officer said that he had "arrested the right man," was not admissible as a dying declaration, nor as res gestae.—Johnson v. State, Tex., 218 S. W. 496.

31. **Death**—Measure of Damages.—The measure of damages for death of child is the difference between the probable money value of the child's services and the probable expense of his education, support, and maintenance from the time of the accident until he becomes of age; but probable money value is not solely tested by what the child might earn if put to outside labor.—Linstroth v. Peper, Mo., 218 S. W. 431.

32. **Deeds**—Delivery.—A deed is presumed to have been delivered on the day it bears date.—Tausk v. Siry, N. Y., 180 N. Y. State 439.

33.——Heirs of the Body.—Under the law of South Carolina, as settled by decision, the words "heirs," "heirs of the body," or "issue," must be construed to mean children, when the testator or grantor clearly indicates that he used the words in that sense.—Davenport v. Hickson, U. S. C. C. A., 261 Fed. 983.

34. **Divorce**—Alimony.—An alimony decree is generally considered a debt of record as much as any other judgment for money.—Levine v. Levine, Ore., 187 Pac. 609.

35.——Constructive Service.—Where a husband residing in Nevada obtained a divorce on service by publication from the wife, then a resi-

dent in Missouri, where a divorce on such service was valid, the decree of divorce will be recognized as valid and binding in the state of New York on collateral attack.—Ball v. Cross, N. Y., 180 N. Y. State 434.

36.——Contempt.—Where husband was unable to pay prescribed alimony, and therefore has not willfully disobeyed order of court, he will not be held in contempt for nonpayment of alimony.—Kemp v. Kemp, La., 83 So. 652.

37.——Custody of Child.—A decree fixing the custody of a child is final when conditions existing at the time of its rendition remain the same, and should be modified only when conditions have changed, and then only for the child's best interests.—Griffin v. Griffin, Ore., 187 Pac. 598.

38.——Domicile.—The question of acquiring a residence for purposes of suing for divorce is largely a question of intention on the part of the alleged resident, but such intention must be bona fide.—Messenger v. Messenger, Iowa, 176 N. W. 260.

39. **Eminent Domain**—Encroachment. — Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, do not constitute a taking of the property.—Higgins v. Board of Supervisors of Dickinson County, Iowa, 176 N. W. 268.

40. **Frauds, Statute of**—Executory Contract.—Authority to make an executory contract for the sale of real estate need not be in writing.—Armstrong v. Palmer, Tex., 218 S. W. 627.

41.——Incident to Debt.—A vendor's lien is but an incident to the debt, and follows the debt in whatever form it may be evidenced.—Ater v. Knight, Del., 218 S. W. 648.

42. **Fraudulent Conveyances**—Bulk Sales Law.—Where a merchant sold a stock of goods and fixtures when indebted over $4,000, though representing that he owed no debts, the sale was in violation of the Bulk Sales Law, and the seller's creditors might look to the property for their debts; the sale being void as to them.—Winchester Packing Co. v. Moyer, Kan., 187 Pac. 680.

43. **Gifts—Inter Vivos.**—Donations inter vivos may be revoked or dissolved because of donee's ingratitude, nonfulfillment of eventual conditions, which suspend their consummation or the nonperformance of the conditions imposed on the donee, Civ. Code, art. 1559.—Hurley v. Hurley, La., 83 So. 643.

44. **Homestead**—Estoppel. — Where owner of lots, who had become insolvent and made an assignment of his estate, recognized conveyance made by his assignee, which conveyance called for the strip in question as an alley boundary of the lot, held, that the owner and his wife, as well as those holding under them, were estopped to claim a homestead rigth in the alley.—Boynton v. Milmo, Tex., 218 S. W. 510.

45. **Homicide**—Dying Declarations.—It is the province of the court to determine in the first instance the admissibility of declarations offered as dying declarations.—Palmer v. State, Okla., 187 Pac. 502.

46. **Husband and Wife**—Separate Property.—Money borrowed by a married woman to invest in real estate is her separate property if credit was extended to her on the faith of her existing separate property; otherwise it is community property.—Moulton v. Moulton, Cal., 187 Pac. 421.

47. **Insurance**—Ambiguity.—In case of ambiguity in an application on which surety company issued a bond, the application is to be most strongly construed against the surety company, which drew the same.—Southern Surety Co. v. Town of Greenville, U. S. C. C. A., 261 Fed. 929.

48.——Estoppel.—Where the general agent of a fire company knew that a policy holder had additional insurance in companies not authorized to do business in the state of Iowa, and with such knowledge added to the policy a rider, authorizing such insurance, the fire company is estopped to assert the invalidity of the policy because of additional insurance at the time the rider was added.—A. A. Cooper Wagon and Buggy Co. v. Nat'l Ben Franklin Ins. Co., Iowa, 176 N. W. 309.

49.——Failure of Proof.—Failure to furnish proof of loss within the time stipulated in a fire policy is no ground for defeating recovery.—Home Ins. Co. of New York v. Roth, Ky., 218 S. W. 471.

50.——Suicide.—Self-destruction, inflicted purposely, is not classed as an "accident" within the meaning of a supplemental life insurance policy, providing for double liability in case of accidental death.—Federal Life Ins. Co. v. Wilkes, Tex., 218 S. W. 591.

51. **Libel and Slander**—Libel per se.—Printed or written language falsely and maliciously charging crime is libelous per se.—Express Pub. Co. v. Wilkins, Tex., 218 S. W. 614.

52. **Landlord and Tenant**—Re-entry.—While a provision in a lease for re-entry on a condition broken may be enforced by the lessor, yet equity may relieve against forfeiture on the ground of mistake, reliance on the conduct of lessor, or waiver of forfeiture.—Faringer v. Van De Hoef, Iowa, 176 N. W. 305.

53.——Termination of Tenancy.—Tender of keys to the lessor by the lessee of a store from month to month was a mere offer to terminate tenancy and surrender possession, which, when promptly declined by the lessor, did not operate as the notice necessary to terminate.—Dorn v. Oppenheim, Cal., 187 Pac. 462.

54. **Master and Servant**—Assurance of Master.—Where a servant complains that the instrumentality or place appears to be dangerous, and the master commands him to proceed with the work and assures him that there is no danger, then, unless the danger is obvious and manifest, the law implies a quasi new agreement, whereby the master relieves the servant from his former assumption of risk.—Hodges v. Murkinson, Ga., 102 S. E. 134.

55.——Joint Liability.—Where a father and son were joint owners of an automobile, in which they were riding for pleasure, both were liable for the negligent operation of the car by the son.—Seiden v. Reimer, N. Y., 180 N. Y. State 345.

56.——Ratification. — An automobile owner's failure to imediately discharge its employe causing injury by negligent operation of the car at a time when he was not engaged in performance of his duties, and a suggestion that the employe retain employer's attorney, did not constitute evidence of ratification of the use of automobile for joy-riding against orders.—Kilroy v. Charles L. Crane Agency Co., Mo., 218 S. W. 425.

57.——Warning.—An employer is guilty of negligent breach of duty to a servant in putting him to work at a place which is unsafe by reason of a protruding set screw on a revolving shaft, without warning of the danger, known to the employer, or discoverable by the exercise of ordinary care.—Ossenberg v. Monsanto Chemical Works, Mo., 218 S. W. 421.

58.——Wrongful Discharge.—An employe may sue upon his unlawful discharge for the amount of wages he would have earned under the contract had he been permitted to fully perform it, and the damages are prima facie the amount provided for in the contract; the employer having the burden of showing what the employe earned or could have earned after his discharge. Osterman v. St. Louis Fish & Oyster Co., Mo., 218 S. W. 410.

59. **Mortgages**—Deed Absolute. — Parol evidence is admissible to show that a deed absolute on its face is a mortgage.—King v. Cole, Iowa, 176 N. W. 299.

60. **Municipal Corporations** — Contributory Negligence.—If a pedestrian knows of an obstruction across a sidewalk, and fails to use ordinary care, and is injured thereby, his negligence bars recovery.—Butler v. City of Conroe, Tex., 218 S. W. 557.

61.——Express Grant.—A municipal corporation has no inherent power to enact police regulations, but such authority must be expressly granted or clearly implied.—Smith v. Hosford, Kan., 187 Pac. 685.

62. **Negligence** — Proximate Cause. — Negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution or prudence would have foreseen that some injury would likely result therefrom, not that the specific injury would result.—Kroll v. Union Pac. R. Co., Kan., 187 Pac. 661.

63. **Novation**—Substitution.—Novation is effected by the substitution of a new obligation, between the same parties, with the intention to extinguish the old one, or by the substitution of a new debtor with the intention to release the old one, or by the substitution of a new creditor with the intention to transfer the rights of the old one to him.—Meador v. Rudolph, Tex., 218 S. W. 520.

64. **Nuisance**—Abatement. — A nuisance may be abated, but inoffensive private property may not be arbitrarily destroyed.—In re Seven Barrels of Wine, Fla., 83 So. 627.

65. **Partnership**—Profits. — As between the parties, participation in the profits of a business raises the presumption of the existence of a partnership.—Hindman v. Secoy, Mo., 218 S. W. 416.

66.——Profits. — Where a contract between plaintiff and defendants for the purchase and sale of cattle provided for a division of profits, a check for the purchase price of the cattle sold, not paid, but placed in the hands of a lawyer for collection, does not constitute profits until payment.—Bower & Bower v. Collinsworth, Ky., 218 S. W. 455.

67. **Payment**—Check of Debtor.—Acceptance of buyer's check by sellers did not constitute payment, where no payment had been made on check, though sellers had previously accepted buyer's checks as payment when checks were paid; the only inference, if any, from such practice, being that tender of check would prevent sellers from successfully asserting a default by reason of nonpayment or nontender.—Bombar v. Fisher, N. Y., 180 N. Y. State 449.

68. **Principal and Agents** — Declaration by Agent.—The rule that agency may not be proven by the alleged agent's declarations does not preclude establishment of such agency by the agent's testimony.—Lyons v. Farm Property Mut. Ins. Ass'n of Iowa, Iowa, 176 N. W. 291.

69.——Personal Business.—A principal is not chargeable with notice of his agent's acts done in the apparent scope of his authority, but with a purpose to defraud the principal.—Mueller & Martin v. Liberty Ins. Bank, Ky., 218 S. W. 465.

70. **Principal and Surety**—Paid Surety.—The rule of law that a surety is a favorite of the law and that a claim against him is strictissimi juris has no application where a bond is executed by a surety for a compensation and where surety is organized for the purpose of executing such bonds for hire and for a profit, such undertakings being construed strongly in favor of the obligee, notwithstanding Rev. St. 1099, § 1209.—Dorr v. Bankers' Surety Co., Mo., 218 S. W. 398.

71. **Railroads**—Vigilance.—The duty of vigilance to avoid accident is upon a traveler continuously until he has crossed the track.—Olds v. Hines, Ore., 187 Pac. 586.

72. **Rape**—Corroboration.—In New Mexico no corroboration of a prosecutrix for rape, by way of testimony of an independent character emanating from an outside source, is required in order to sustain a conviction.—State v. Armijo, N. M., 187 Pac. 553.

73. **Sales**—Consideration.—The seller of goods being under obligation to deliver at the contract price, the buyer's agreement to pay an increased price is without consideration.—Porter v. Orensein, N. Y., 180 N. Y. State 418.

74.——Delivery.—The purchaser of goods is not required to accept delivery of them at a place other than provided in the contract, and limit damages to the difference in cost of shipping from the two places, but may stand on his contract, and recover as though the seller had refused to make any delivery.—Dallas Waste Mills v. Early-Foster Co., Tex., 218 S. W. 515.

75.——Implied Warranty.—Where the inside of stacks of hay purchased by defendant could not well be examined until the hay was used, and part of it was unmerchantable because it had spoiled, defendant was entitled, under Comp. Laws 1913, § 5981, to recover upon an implied warranty of merchantability.—Gussner v. R. Miller & H. Shuper, N. D., 176 N. W. 359.

76.——Rescission.—A rescission of a contract of sale, accepted by the seller, entitles the parties to be put in statu quo in respect to the contract, and entitles the buyer to recover all money paid thereon.—H. Muller & Co. v. Effangee Tobacco Co., N. Y., 180 N. Y. State 344.

77. Warranty.—The positive representation by a seller that the article sold possesses a certain value and certain qualities amounts to a warranty.—Swift & Co. v. Meekins, N. C., 102 S. E. 138.

78. **Telegraphs and Telephones.** — In suits based upon interstate messages, laws of the state where the message originates must determine whether mental anguish alone can be regarded as an element of actual damages.—Western Union Telegraph Co. v. Epley, Tex., 218 S. W. 528.

79. **Trover and Conversion**—Demand and Refusal.—Where a conversion has actually occurred, there is no necessity of alleging and proving a demand and refusal to maintain an action of trover.—Daniels v. Foster & Kleiser, Ore., 187 Pac. 627.

80.——Punitive Damages.—A finding of actual damages to the amount of the usable value of personal property wrongfully taken will support a recovery for punitive damages.—Sansone v. Studebaker Corporation of America, Kan., 187 Pac. 673.

81. **Vendor and Purchaser** — Tender. — Purchaser's repudiation of contract before time for delivery of deeds made formal tender of deeds by vendor unnecessary.—Armstrong v. Palmer, Tex., 218 S. W. 627.

82. **Water and Water Courses**—Prior Appropriation.—Where waters from an artificial stream created by an owner thereof are deposited into a natural stream, so that the creator of the flow has lost his dominion over it, the appropriator of the water can acquire no right as against the creator of the flow to require him to continue supplying such waters to the stream.—Hagerman Irr. Co. v. East Grand Plains Drainage Dist., N. M., 187 Pac. 555.

83.——Prior Location.—The first locator on mining ground has no right, by custom or otherwise, to allow "tailings" to run free in gulch through which stream runs, and render valueless the mining claims of subsequent locators below him.—Dripps v. Allison's Mines Co., Cal., 187 Pac. 448.

84. **Wills**—Charitable Use.—One of the essential features of a "charitable use" within such statute is that it shall be for the public benefit, either for the entire public or for some particular class of persons indefinite in number who constitute a part of the public.—In re Dol's Estate, Cal., 187 Pac. 428.

85.——Conflicting Provisions.—The first provision of a will prevails over the last.—Newell v. Kern, Mo., 218 S. W. 443.

86.——Testamentary Capacity.—Testamentary capacity as to personalty is governed by the law of the testator's domicile, and personalty should be distributed accordingly.—Shaw v. Grimes, Ky., 218 S. W. 447.

87. **Work and Labor** — Gratuitous Service.—Where one is employed in the service of another for any period of time, the law implies a promise to pay what such services are reasonably worth, unless it is understood that the services were rendered gratuitously, or unless they were rendered under circumstances repelling the presumption.—Dev v. Quinn, Ariz., 187 Pac. 578.

88.——Quantum Meruit.—Where one renders services as a member of the family of the person served, receiving support therein, a presumption arises that such services are gratuitous, and to authorize recovery therefore it must appear that the services were rendered in the expectation by the one of receiving, and by the other of making, compensation therefor.—Hendryx v. Turner, Wash., 187 Pac. 372.